that he put and is still putting the respondent under "Melleril" a form of tranquillizer which would help the mind to think properly as well as to allay aggressiveness. A patient suffering from endogenous depression usually suffers from delusions, hallucinations and illusions. This witness is of the view that if the respondent fails to come for care and treatment and if the treatment of "Melleril" drug should stop, the patient would suffer a relapse. The inference is clear, it is necessary for the respondent to continue the treatment. In his opinion the respondent would not be able to look after herself, and he has not in his limited experience come across an endogenous depression patient being completely cured after treatment.

At the conclusion of the evidence of the petitioner, counsel for the respondent wished to make a submission of no case to answer. In accordance with the practice adopted in the Divorce Division of the High Court in the United Kingdom, (see *Yuill* v. *Yuill*[5]) the court informed counsel of refusing to rule on the submission unless counsel made it clear that he was going to call no evidence. In other words, counsel was asked to make an election. Counsel then applied for and was granted a brief adjournment to consider this matter. On resumption, respondent's counsel intimated that he would not be calling any evidence, and proceeded to make his submission. It is worthy of note that in filing an answer to the petition, paragraph 1 reads: —

"The respondent admits that in 1964 she was sent to hospital for medical treatment and that by the end of 1964 she had been cured of her illness".

No evidence was adduced to substantiate this statement. I take it to be the law that the onus is on the petitioner to prove that the respondent is of unsound mind and that the unsoundness of mind is incurable.

Relying on the expert evidence of Dato Ting Lik Hung, I am satisfied that there exists a Foochow custom in Sarawak whereby a spouse may petition for dissolution of the marriage registered under the provisions of the Chinese Marriage Ordinance, on the ground that the respondent is suffering from an incurable mental illness which can be proved by admissible medical evidence by a competent witness. The test of what would constitute "incurably of unsound mind" is the same as in English law, namely her capacity to manage herself and her affairs including the problems of society and of married life and that she permanently lacked such capacity.

Having considered all the evidence given in this case, I am satisfied that the petitioner had discharged the burden of proof. Notwithstanding the presence of the respondent in court, I was satisfied that she was and still is suffering from unsound mind and that her mental illness is incurable within the meaning of the test expounded above.

I was also satisfied on the evidence adduced that prior to 1964, the conduct of the petitioner did not conduce to the respondent's mental state and condition. Accordingly I make an order dissolving the Chinese marriage contracted between the petitioner and the respondent forthwith.

Since leaving the matrimonial home in Roban in 1964, the respondent had never returned to it. During all this time, she has been living with her father in Sibu. All the five children of the marriage have always been taken care of first, by the mother of the petitioner and later by the eldest daughter, Kong Bee Lian (f). I think it is in the best interest of the children that they should stay together. In view of the finding of the court, and apparently there was no objection from the respondent or her counsel, I order that the petitioner shall have the care and custody of all the five children of the marriage.

Under the circumstances of the case and in the exercise of my judicial discretion, I make no order as to costs. Each party shall therefore pay his or her own costs in these proceedings.

Order accordingly.

MYRIAM v. MOHAMED ARIFF

[O.C.J. (Abdul Hamid J.) January 26, 1971]

[Kuala Lumpur — Originating Summons No. 344 of 1969]

Infants — Guardianship — Guardianship of Infants Act, 1961, ss. 5 and 11 — Whether Act applicable to infants who are Muslims — Whether application can be made to High Court despite consent order made by a Kathi — Paramount consideration welfare of the child — Selangor Administration of Muslim Law Enactment, 1952, ss. 45 and 46 — Civil Law Ordinance, 1956, s. 27.

Muslim Law — Infants — Guardianship — Welfare of child — Primary consideration.

This was an application for the custody of two infants, a girl aged 8 years and a boy aged 3 years. The applicant, the mother of the infants, had been divorced by the respondent, the father of the infants. At the time of the divorce, the *Kathi* had recorded a consent order giving the custody of the infants to the respondent. Since the divorce the applicant had remarried a man not related to the infants. It was contended by the respondent *inter alia* (a) that the applicant was precluded from making the application as she had consented to the order for custody made by the *Kathi;* (b) that the Guardianship of Infants Act, 1961 was inapplicable as the infants were Muslims.

Held: (1) in the light of section 45(6) of the Selangor Administration of Muslim Law Enactment which provided that nothing in the Act shall affect the jurisdiction of any civil court, the applicant was entitled to make the application, despite the consent order made by the *Kathi,* and the court had jurisdiction to hear the application;

(2) that sections 5 and 11 of the Guardianship of Infants Act, 1961 were applicable, as there was nothing to show that these provisions conflicted with or were contrary to the Muslim religion or custom of the Malays;

(3) that in applying the provisions of the Guardianship of Infants Act, regard must be had to the religion and customs of the parties concerned, but the decision need not be made in accordance with the rules of the religion or custom except when it relates to or concerns a person under the age of 18 years professing the Muslim religion, in which case any provision which conflicts with or is contrary to the Muslim religion or custom of the Malays will not apply;

(4) that both under the English law and the Muslim law the primary consideration is the welfare of the child and applying this consideration in this case, the custody of the girl would be given to the respondent and the custody of the boy to the applicant until he reaches the age of 7 or 8 years

when either party may be at liberty to apply. The parties will also be given reasonable access to the children and temporary custody during the school vacations.

Case referred to:-

(1) *In the matter of Omar bin Shaik Salleh and Hanisah binte Shaikh Salleh, Infants; Shaikh Salleh bin Omar Jammal* v. *Mariambee binte Shaik Omar* [1948] M.L.J. 186.

ORIGINATING SUMMONS.

Abdul Rahim Noor for the applicant.

S.T. Gamany for the respondent.

Cur. Adv. Vult.

Abdul Hamid J.: This is an application by originating summons for the custody of two infant children, a girl by the name of Nor Izan 8 years and a boy, Mohamed Faizal about 3 years old.

Both the applicant and the respondent rely mainly on their respective affidavits. The statements contained in these affidavits were carefully summarised by Raja Azlan Shah J. who originally heard this application. With respect to the learned judge, I would reproduce hereunder the relevant part of the summary and adopt it as my own.

"The applicant is a Swiss lady by the name of Theresia Maria Ruthemann. She met the respondent in London. They were later married at the London Central Mosque, Regent Lodge Park, London, whereupon the applicant took her present name, Myriam binti Abdullah. The said marriage was registered under the English Marriage Act, 1949. On their returning to Malaysia, the said marriage was subsequently registered at the Registry of Marriages, Kuala Lumpur on the 28th November, 1960. There are two children of the said marriage, a girl Nor Izan and a boy Mohamed Faizal.

On the 18th September, 1963, the parties went to the *Kathi's* court at Petaling Jaya to effect a divorce. With the consent of the parties, a divorce with condition *(Talak Taliq)* was granted. The said condition was that the respondent was to have the custody of the children but the applicant could have access to them.

On the 25th November, 1968, the applicant married Wan Mohamed Don of Kuantan with whom she now lives. The respondent, later in January, 1969, married his cousin Wan Fatimah Maheran binti Dato Wan Ibrahim.

In her affidavit, the applicant alleged that when they went to the *Kathi's* court for the purpose of getting a divorce, the respondent had refused to allow her to bring a lawyer and an interpreter, and that the respondent had threatened not to grant her a divorce if she were to bring the lawyer and the interpreter. The respondent instead brought two of his own people, the Penghulu of Kuala Lumpur, (a relative of the respondent) who acted as interpreter, and the other, a woman servant, Mariam, who was the witness. The applicant alleged that the Penghulu was poor at translating what had been said by the parties during the divorce proceedings, so that she was induced into signing the declaration without properly realising the consequences, and it was only later that she learnt that the *Kathi* had given custody of both the children to the respondent.

The applicant also alleged that since the divorce, the children had been taken away from her and that she had, from her observations, a strong feeling that they were not well taken care of by the respondent. In respect of the boy, Mohamed Faizal, she contended that he had not been under the continuous custody of the respondent. Between December, 1968 and January 1969 she found him in Wan Harun's and Wan Khairul's (cousin of the respondent) custody at Kampong Pandan; on the 5th April, 1969, she saw him at Zaitun binti Dato Othman's house at Damansara under Wan Khairul's care; on the 22nd and 29th April, the child was found to be at Dato Othman's house, (the respondent's father); and that there were five occasions when she tried to see the child but none of the relatives could tell where he was. Furthermore, she alleged the child, on one occasion, was found in a cot with a broken milk bottle, and on another occasion, she found the child's clothings were dirty and he smelt of urine; and on 15th March, 1969, she saw that the child had a burn on the top of his right hand and she found out later that the child had not been taken to the hospital until ten days later.

In respect of the girl, Nor Izan, the applicant alleged that between December, 1968 and March 1969 she noticed her hair had lice and she had to put kerosene to clean the hair. She alleged that when the respondent and his present wife were having their "bersanding" ceremony in Alor Star, the child was sent to Klang, and that when the respondent was away from Malaysia, the child stayed in the respondent's house under the care of an amah. There was one occasion, she alleged, she found the child locked inside the respondent's house with his sister who was mentally ill, and the child was crying to get out; the respondent had also inflicted mental cruelty on the child by telling her that he, the respondent, did not want her and Faizal any more. When the child had septic spots it was she, the applicant, who sent her for treatment. The applicant therefore prayed that in the best interest of both the children, mentally or otherwise, they be put in her care and custody especially when the children are still at a very tender age and need all the care and love of a mother.

The respondent, in his affidavit, averred that the custody of the children had been rightly given to him by the order of the *Kathi* with the voluntary and free consent of the applicant who had signed the declaration after it had been read over and explained to her, and that since the *Kathi's* order was made by consent, under section 46(1)(b) of the Selangor Administration of Muslim Law Enactment, 1952, the proviso provides that it could not be made the subject of appeal; and even if she has such a remedy, she was out of time as more than one year had passed since the order was made. The Enactment contemplates that the appeal be made within fourteen days of the date of the order of custody; and as she had not done so, she could not now resort to this court to reopen the *Kathi's* decision.

It was further contended by the respondent that under Muslim Law of the Shafie School a mother loses the custody of the infant children if she stays away from her husband without his knowledge and consent, or subsequently marries a man who is a stranger, that is a person not within the prohibited degree of marriage to the applicant's children. The applicant had left the respondent and gone to Kuantan on the 15th September, 1968 to her present husband's house, without the respondent's knowledge or consent; and at that time the applicant's present husband was still married to his former wife. And that, even if the custody of the children is given to the applicant, it is still doubtful whether the children will be well cared for because the applicant's present husband has five other children from his previous two marriages to look after and to maintain; furthermore, there is a risk of the children being taken out of this country in the event that the applicant's present marriage fails as what had happened to the applicant's present husband's two former marriages, and as such, there is also the danger that the children will not be properly brought up as Muslims in view of the applicant's religious background.

The respondent further averred that the two children had been staying with him for more than a year now, and, as the respondent alleged, there is a strong bond of love and affection existing between the children and his wife and himself that it would disturb them emotionally if the present arrangement be disturbed. In the consequences, the respondent prayed that he and his wife are the best persons to have the care and custody of the children."

The oral testimonies of the applicant and the respondent were adduced at the hearing of this application in cross-examination and re-examination. In

answer to cross-examination by the respondent's counsel, the applicant admitted that she left for Kuantan on 15th September, 1968 with an amah and her son and stayed for three days at her present husband's house without getting the consent of her husband. However, she alleged that prior to September, 1968 she was sent to Kuantan by the respondent to get her out of the way. The respondent did state that on one occasion in the middle of 1967, at his request, the applicant and her infant daughter spent their holiday in Kuantan. They stayed at the applicant's present husband's house and after a week the respondent joined them.

The applicant did not deny that she was running a kindergarten in September, 1968 and spent the whole morning there leaving the infant boy with Wan Puteh. However, she alleged that the respondent had not objected to it and moreover she was satisfied the baby was well looked after.

The respondent maintained that the conduct of the applicant in neglecting the children when she was engrossed with her kindergarten and oil palm nursery and in consenting to leave the children to him in preference to her present husband shows that she is not in a better position to devote her full time to her children.

The respondent in his testimony disclosed that he now has a child by his marriage with the present wife — a baby seven months old. His wife is a teacher at the Convent, Brickfields and the amahs are looking after the two infant children. It is revealed that she would have to devote some time to her own child. The respondent however maintained that there is no sign of her giving preference to her own child. Being a teacher she makes it a point to see that Nor Izan does her homework.

According to the respondent, the infant boy has been staying with him for more than two years, that is, since the applicant left him at the age of eight months old. The bond and affection between him and the infant boy, between the infant boy and his sister and between his present wife and the infant boy is so strong that nothing in the world should upset it He believed that the infant boy would not crave the love and care of the natural mother as he had taken his present wife who is an aunt of the infant, as his mother. He also believed that the infant boy grew up and accepted his present wife as his mother.

Referring to the allegation by the applicant that he made no arrangement for the birth of the baby when he left for India, and that she had with her very little money, the respondent stated that as he thought the baby would not be born at least a month after the date of the departure, he did not consider it necessary to make arrangement to the last detail. Nevertheless he spoke to Wan Don and requested him to arrange for transport and other needs in the event of delivery.

So much for the oral testimony, and, before proceeding to consider the merits of the case, I shall deal first with the contention of the respondent that the applicant, having voluntarily and freely consented to the *Kathi's* order, is now estopped from reopening the case by making this application. On the facts of this case, I do not think it can seriously be denied that at the divorce proceedings before the *Kathi*, the applicant did not object to the order being made. Nevertheless the question before the court is, I think, whether, notwithstanding the consent, the *Kathi's* order could be made the subject of appeal and that this court has jurisdiction to hear this application. The proviso to section 46(1) (b) (iii) which is relied upon by the respondent reads —

"Provided that no such appeal shall lie against a decision made by consent."

For easy reference, I would set out the relevant subsection of section 46, namely, subsection (1) —

"46.(1) An appeal shall lie to the Appeal Committee hereinafter constituted from any decision of the Court of the *Kathi Besar* or a Court of a *Kathi* —

(a) in its criminal jurisdiction, by a person convicted and sentenced to imprisonment or to a fine of not less than twenty-five dollars; such appeal may be against conviction or sentence or both;

(b) in its civil jurisdiction —

(i) by any person aggrieved by the decision, if the amount in issue on the appeal is not less than one hundred dollars,

(ii) in all cases involving any decision as to personal status, by any person aggrieved by the decision,

(iii) in all cases relating to maintenance of dependants, by any person aggrieved by the decision:

Provided that no such appeal shall lie against a decision made by consent; and

(c) in any other case, if the Appeal Committee shall give leave to appeal."

In the context of section 46, I am inclined to think that this proviso does not operate in respect of the said order. Under section 46 (3) (iii) of the Selangor Administration of Muslim Law Enactment, a *Kathi* does have the power to hear and determine proceedings relating to custody of infants and an appeal committee may hear an appeal from the decision of a *Kathi's* Court. However, reading section 46(1), which I must say is not happily worded, it would appear that if the applicant was appealing, she could proceed in the manner provided by section 46(1)(c). The proviso referred to by the respondent seems to relate specifically to appeal in cases relating to maintenance of dependants [section 46(1) (b) (iii)], and it does not appear to cover appeals in cases of custody of infants. For reasons which I have stated above, I do not think that the proviso would in any way affect the right of the applicant to appeal. Since there was no appeal or application for leave to appeal, further discussion on this issue would be purely academic. Notwithstanding the fact that the applicant had not filed any appeal and applied for leave to appeal, it cannot, I think, be seriously challenged in view of subsection (6) of section 45, that the applicant is estopped from making this application. Subsection (6) of section 45 reads —

"45.(6) Nothing in this Enactment contained shall affect the jurisdiction of any Civil Court and, in the event of any difference or conflict arising between the decision of a Court of the *Kathi Besar* or a *Kathi* and the decision of a Civil Court acting within its jurisdiction, the decision of the Civil Court shall prevail."

In the light of this subsection, I am of the view that the applicant is entitled to make and indeed the court has jurisdiction to hear the application.

It is also contended by the respondent that the Act does not apply as the subject matter of the proceedings, that is, the two infants are Muslims and under the age of 18. To my mind, this provision has been misconstrued. It would seem to me that it is not the intention of the legislature that the provisions of the Guardianship of Infants Act, 1961 should have no application to any person under the age of 18 and professing the Muslim religion. It is only where such provision conflicts or is contrary to the Muslim religion or custom of the Malays that it shall not apply. Section 2 of the Selangor Guardianship of Infants (Adoption) Enactment, 1961 (6 of 1961) clearly provides —

"(2) The Guardianship of Infants Act, 1961, is hereby adopted by this Enactment and applied to persons professing the Muslim religion:

Provided that —

(a) Nothing in the said Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of eighteen years who professes the Muslim religion...."

Sections 5 and 11 of the Guardianship of Infants Act, 1961 seem relevant to the matter under consideration, but to my mind they do not conflict with and are not contrary to the Muslim religion or custom of the Malays. Section 5 of the Guardianship of Infants Act, 1961 while providing that subject to the provisions of section 10 which relates to removal of guardian by the court or a judge, states that the father of an infant shall be the guardian of the infant's person and property. It also permits the court or a judge to make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent. Section 11 of the Act provides that the court or a judge in exercising the powers conferred by the foregoing provisions of the Act shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be. In my view, this section lays down the basic principle upon which the court should be guided in considering application for custody In that respect I think it is consistent with the underlying principle under the Muslim law that in considering custody, the paramount factor for the court to consider is the welfare of the infants.

At this juncture, I wish to consider whether in dealing with an application such as this, the English law will apply. I have earlier on expressed the view that section 11 of the Guardianship of Infants Act, 1961 is relevant for purposes under consideration. Under section 27 of the Civil Law Ordinance, 1956. it is provided that —

"(27) In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Ordinance, *regard being had to the religion and customs of the parties concerned,* unless the other provision is or shall be made by any written law."

In general, I think, it means that in applying the provisions of the Guardianship of Infants Act, regard must be given to the religion and custom of the parties concerned. This does not however mean that any decision must be made in accordance with the rules of the religion and custom of the parties concerned except of course, when it relates to or concerns with any person under the age of 18 and professing the Muslim religion, in which case, any provision which conflicts or is contrary to the Muslim religion or custom of the Malays, will not apply.

Under the English law, it is settled law that the primary consideration is the welfare of the children. Under the Mohammedan law certain rules have been laid down regarding the custody of infants. However, it would seem that even under the Muslim law the general principle that governs the custody of infants is the welfare of the infants. In "Mohammadden Law" by Syed Ameer Ali, 6th edition, Vol. II pp. 225/6, the learned author said —

"Though the period of *hizanat* varies among the different schools, the general principle, which governs its duration, is founded essentially on the interests of the child."

In the present case, the learned counsel referred to a number of cases in their submissions. These cases are, I think, useful as a guide but the court has to bear in mind that the decision in each of these cases invariably depended upon the merits of that particular case. It is difficult, if not impossible, to rely on the decision of any one case. The English cases cited by Mr. Gamany, counsel for the respondent, tend to confirm that the decisions of the courts in England in custody cases are founded primarily upon consideration of the interests of the infants. Mr. Rahim Noor, counsel for the applicant, referred to a number of cases to emphasize the proposition that even in Muslim law, the ultimate decision of the courts will invariably be influenced by the consideration of the welfare of the infants. In the matter of *Omar bin Shaik Salleh (m) and Hanisah binti Shaik Salleh (f), Infants; Shaik Salleh bin Omar Jammal* v. *Mariambee binti Shaik Omar (m.w.)*[1] a Singapore case, the learned acting Chief Justice Pretheroe in dismissing the appeal said that he was satisfied the learned judge regarded the welfare of the infants as the paramount consideration and exercised his discretionary power in the manner required by section 11 of the Guardianship of Infants Ordinance (Cap. 50). Brown J. who gave separate judgment observed that even in Muslim law, the court has a discretion to depart from ordinary rule. Though this case may not be binding upon me, it has its persuasive value. It tends to support the proposition that even under the Muslim law, custody of infants may be given in departure to the ordinary rule. The learned judge said at page 187 —

"In the appellant's memorandum of appeal the second ground reads as follows —

That according to Mohammedan law where a divorced woman contracts a second marriage and has issue by such second marriage she is not entitled to the custody of her infant children by her prior husband.

I think it right to point out that if the above statement of the law is intended as a hard-and-fast rule it cannot be accepted without qualification.

It seems to me that *Ameer Ali*, in his book on Mohammedan Law at page 257, (5th Edition), makes this quite clear. I think the true position is that just as section 5 of the Guardianship of Infants Ordinance ordinarily gives the custody to the father but allows the Court a discretion, so by the rules of Mohammedan law a woman who marries a stranger is ordinarily deprived of the right to the custody of her infant children by a former marriage, but there too the court has a discretion to depart from the ordinary rule. In this case if the learned judge had applied the ordinary rule, whether under the Guardianship of Infants Ordinance or under Mohammedan law, he would have given the father the custody. But believing this to be a case in which he ought to exercise his discretion he gave the custody to the mother and this discretion would have been exercisable as well under Mohammedan law as under the Guardianship of Infants Ordinance. I only mention this because it would appear to me that even if the learned judge had taken Mohammedan law into account the result in this case would have been the same."

The decisions of some of the other cases cited by Mr. Rahim Noor also tend to establish that despite the rules under the Muslim religion, custody of infants has been awarded to one in preference of the other where the interests and welfare of the infant demand. It will therefore be seen that it is by no means easy to make a decision on an application such as this. In my endeavour to do justice, I propose to exercise my discretion and have regard primarily to the welfare of the children. In doing so, it is not my intention to disregard the religion and custom of the parties concerned or the rules under the Muslim religion but that does not necessarily mean that the court must adhere strictly to the rules laid down under the Muslim religion. The court has not, I think, been deprived of its discretionary power.

In the instant case, both parties to the proceedings profess the Islamic faith and under Muslim law, it seems to be the rule that where the parents are separated and the mother has not married, the custody of a boy until he has reached his seventh year and of a girl to the age of puberty belongs to a mother and a woman entitled to the custody of a boy or girl is disqualified if —

(a) she remarries a man not related to the minor within the prohibited degree, so long as the marriage subsists;

(b) she resides at a distance from the father's place of residence;

(c) she fails to take proper care of the child; and

(d) she commits an act of a gross and open immorality.

I do not propose to deal at length with each of these disqualifications. I am of the opinion that the court is not disentitled to make an order for custody, giving the infant to any of the parents if the welfare of the infant so demands. There were allegations and counter-allegations by the respondent particularly in regard to the conduct of the applicant. They relate mainly to certain states of affairs which can no longer be said to exist.

It is an irresistible conclusion, in fact it is the conclusion which to my mind there is not the slightest doubt, that whatever had been the reason which led to the breaking-up of the marriage, both the applicant and the respondent do love the children and are genuinely interested in taking care of the two infants. That, I must confess, makes it even more difficult for me to decide. As for the applicant, it is revealed that she is now married to a senior government officer and a Muslim. In view of his record of previous marriages and divorces, the respondent naturally is claiming that he is unfit to look after the step-children. In fairness to him, I do not think it is reasonable for this court to draw such an inference. There is in fact not a scrap of evidence before this court concerning the circumstances of his previous marriages and divorces. On the contrary, there is evidence to show that the two grown-up children of his first marriage, though they are not staying with him, are being maintained and cared for by him. There is also evidence to show that the three children of his second marriage who are now living in Ireland, are being regularly maintained by him in the sum of £75 per month.

As regards the circumstances that brought about the separation between the applicant and the respondent, there is very little evidence upon which this court can possibly arrive at any definite conclusion. And as regards the conduct of the applicant the court is also unable to form any definite conclusion as to whether she has in fact committed or was guilty of any immoral act. Though it is contended that it was the applicant who desired to obtain a divorce in order to marry her present husband, the surrounding circumstances which led to this state of affairs, cannot, I think, be entirely ignored. It is alleged by the applicant that he did not care to make arrangements for the birth of their second children when he was going to India. The respondent claimed that as the applicant's present husband was a close and intimate friend of his he had entrusted him with the arrangement of transport etc. should there be delivery of the baby before his return. The applicant alleged that the respondent had sent her to Kuantan so that she would be out of the way. She was obviously referring to the occasion when in the middle of 1967, the respondent sent the applicant to stay at her present husband's house in Kuantan for a holiday. Though there was nothing objectionable, it does seem rather unusual that the respondent should do this. Nevertheless it did not, I think, afford proof that the respondent was sending her out of the way. However, it may be argued that the respondent himself afforded the opportunity for the applicant to establish relationship with her present husband. This seemed to be the root of the trouble that led to the separation.

In view of the surrounding circumstances, it is indeed difficult to say where the fault exactly lies. It is true that the applicant did leave for Kuantan without the consent of the respondent. However, it has to be borne in mind that in all probability the applicant has no relative to whom she may turn to during times of trouble. The court does not propose to sit in judgment as to whether, in the circumstances, the applicant had been guilty of any immoral act or whether the respondent by his conduct had contributed towards the establishment of the relationship between the applicant and her present husband. This court is concerned with and indeed it is my intention to consider the position of the parties today and give custody of the infant to whoever, in the opinion of the court, is the

proper person, having regard primarily to the interests and welfare of these infants.

The applicant's present husband is drawing a good income and I believe he is in a position to maintain and look after the infants if their custody were to be given to the applicant.

As regards the respondent, he is now married to his cousin and has an issue by the said marriage — a child about 7 or 8 months old. The respondent is a senior and respectable officer of the government and is also drawing a very good income and is undoubtedly in a position to maintain the infants should custody be given to him.

As I said earlier, the primary consideration before this court is the welfare of the children and in considering the custody of Nor Izan, the infant daughter, it is essential to bear in mind that she is now about 8 years old and the question as to her education and religious instruction becomes, I think, an essential factor to be considered. It is disclosed from the evidence that her progress at school is good and she is receiving religious instruction. I am satisfied that she is well looked after by the respondent. The court therefore feels that the present arrangement should not be disturbed. It is in her welfare that the custody should remain with the respondent. When I spoke to Nor Izan during the interview in my chambers, I found her intelligent. She seems fully conscious of what had happened to the marriage of her parents and is conscious of the fact that the custody of herself is being litigated. She however lacked the spirit often apparent in a child of her age. Nonetheless I am inclined to think that she is quite capable of taking care of herself. I therefore order that the respondent shall have the custody of Nor Izan.

As regards the infant boy, Mohamed Faizal, unlike his sister, he is still in the tender age and from what I observed during the interview, it appears that he is quite unaware of what had really happened to his parents. When the applicant and the respondent came into the chambers, he seemed overjoyed at the sight of the applicant. I do not think that words alone are adequate to describe the expression of love and affection that his eyes seemed to convey when he greeted the applicant particularly judging from the manner he sat upon the applicant's lap with one arm around her neck. To my mind, it would not be in the interests and welfare of this infant that he should be denied of the natural mother's love, care and affection. It is proper that he should be in the custody of the applicant until at least he reaches the age of 7 or 8 years at which time either party may be at liberty to apply. At that age, the question of education and religious instruction would be an important factor to consider. The respondent of course contended that his present wife is the boy's aunt and he has accepted her as his mother and has even called her "Mama". In view of the infant boy's age, I think that the court can hardly make any definite conclusion. In this connection, the court cannot however lose sight of the fact that she, being a teacher, not only has to attend to her work but also to her own child and it is therefore seriously doubted whether she could find time to devote to the infant boy and bring him up with all the love, care and affection as the natural mother would. Furthermore, it is revealed that at present, both the infant children are looked after mainly by the amahs.

It may be argued that if custody of the infant boy were to be given to the applicant, it may mean a separation between him and his sister. The court is conscious of this, and after taking into consideration (a) the difference of the ages between the infant boy and his sister and their sexes, and (b) the fact that Nor Izan is now attending school and taking religious instruction, the court is inclined to think that it is not detrimental to the interests of the infant boy or the girl even if they are separated. I also feel that the separation would not really upset them emotionally.

For the reasons which I have stated, I am of the opinion that the interests and welfare of the infant boy demand that his custody be given to the applicant until he reaches the age of 7 or 8 years when either party may be at liberty to apply.

In view of the order that I have made, it is necessary to consider the question of access, and temporary custody during school vacation. Arrangement was made during the last school vacation that the children would spend the first half of the school vacation with the applicant. I see no reason why the same arrangement should not be made in respect of Nor Izan. It would be in the interests of the infants that they be afforded the opportunity to be together during the school vacation. It is ordered that the applicant shall have temporary custody of Nor Izan during the first half of every school vacation. At any other times, the applicant shall have access to Nor Izan on one week-end in each month on Saturday and Sunday between the hours of 9.00 a.m. and 6.00 p.m. after giving the respondent at least 3 days notice. The respondent on the other hand, is entitled to have access to the infant boy on one week-end in each month on Saturday and Sunday between the hours of 9.00 a.m. and 6.00 p.m. after giving the applicant at least 3 days notice. Further, the respondent shall have temporary custody of the infant boy, Mohamed Faizal, during the second half of school vacation.

Each party shall bear its own costs.

Order accordingly.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Diam & Gamany.*